No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),
Plaintiff in Error,

vs.

R. F. PRAY,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

WILLARD P. SMITH,
MARK J. WOOLEY,
Attorneys for Plaintiff in Error.

BERNAL-WALSH PRINTING CO., SAN FRANCISCO

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THE LETTERS ARE A SUFFICIENT ACKNOWLEDGMENT TO TOLL THE STATUTE OF LIMITATIONS.

Defendant in his brief absolutely confuses this case as he has the idea that even though the acknowledgment of the note was made before the note had outlawed yet the acknowledgment alone was not sufficient but there should have been a promise to pay it. And the trial court made the same mistake. Otherwise, it could not have ruled out the letters offered by us in evidence.

This case is in reality a very simple one. It is merely the case of an acknowledgment of a note

made prior to the outlawing thereof. As this court well knows in such a case there need not be a promise to pay the note. Therefore, a great many of the cases cited by defendant in his brief are not in point and cannot be considered as they are cases where the obligation had already outlawed before the act or acts that were claimed to overcome the statute of limitations took place. In such a case there must be, as this court is well aware, a promise to pay the obligation.

Now, do the letters offered by us in evidence constitute an acknowledgment of the note sufficient to toll the statute of limitations? They certainly do. Otherwise, they mean nothing. And in the construction of these letters this court must bear in mind that it is not dealing with a case where judgment was rendered after full trial, on appeal from which the evidence is to be interpreted most strongly in favor of the trial court's decision, but that it is dealing with a case where a judgment of non-suit was rendered, on appeal from which, as well as on the decision of the motion for the non-suit itself, every intendment is to be in favor of the plaintiff and every doubt as to the evidence resolved against the defendant. Keeping this thought in mind it is clear that the letters are a sufficient acknowledgment.

Eliminating the letters written more than four years prior to the date of the commencement of this suit, which was February 24th, 1921, according to

defendant's own admission on page three of his brief, the first letter written before the note outlawed on its face, which was March 22nd, 1920, and during the period of four years prior to the date of the commencement of this suit, was the letter of the president of the plaintiff to the defendant dated November 19th, 1918 (Transcript pages 27-8) to the effect that the plaintiff is holding the note sued upon in this action and that it has received thereon from the trustee for the maker $993.21, leaving a balance of $3506.79 due on the principal thereof. This letter also offers to release the defendant as a guarantor of the note upon his paying $1753.40, that is, one-half of the above balance. The real answer to this letter is found in the letter from the defendant to the president of the plaintiff dated December 11th, 1918 (Transcript pages 30-1), the intervening letters being merely a letter dated November 26th, 1918, from the defendant that he will answer the above mentioned letter of November 19th, 1918, and a letter from the president of the plaintiff dated December 2nd, 1918, again asking defendant to answer said letter of November 19th, 1918. Said letter of December 11th, 1918, from defendant to the president of the plaintiff refers to the correspondence which had passed between them in regard to the note and states that defendant had been informed that there was in the hands of the trustee for the maker of the note a considerable amount of money, which would very soon be distributed among the creditors of the maker. In said letter defendant also

states that he does not wish to stall the matter off but feels that before making settlement the amount received by the plaintiff from the trustee should be applied on the note.

What does this letter mean? It simply means that the defendant does not wish to put off paying the note but feels that before he does pay it the plaintiff should apply on the note the money which defendant says plaintiff will shortly receive from the trustee. As this is the purport of the letter it is, of course, an acknowledgment of the note itself. What else could it be? When a guarantor on a note says to the holder of it that he does not wish to put off paying the note but that he feels that it is only right that the holder should apply what he receives from the maker before he, the guarantor, pays the note, what does he do? He certainly does not repudiate the note or indicate an intention that he cannot or will not pay it. But he does just the opposite. He unqualifiedly acknowledges that the note is a subsisting obligation as against him. There can be no other sensible meaning to this letter of defendant.

And this letter of defendant is also a promise to pay the note, for the defendant says in effect that he is ready to make payment but that before he does so he feels that the amount received from the trustee should be applied on the note. There is not a word in the letter to the effect that defendant repudiates the note or that he is not willing to or cannot pay it. The letter meets fully the requirements as to

acknowledgments sufficient to toll the statute of limitations laid down not only by the cases cited by us in our opening brief but also by the cases cited by defendant in his brief.

It cannot be said that this acknowledgment or promise is conditional as the defendant in this letter does not make the application of the amount received from the trustee a condition of his paying the note. He merely says that he feels that it is only proper that such application should be made before he pays the note. But even if he did make it a condition it would make no difference, for, plaintiff would not have to wait forever to receive more money from the maker of the note (it did wait two years and three months, which was certainly much more than a reasonable time, which is all that it would have to wait) and it appears that plaintiff never did receive anything more on the note since the defendant, on whom, as this court well knows, rested the burden of proving payment, did not prove that anything more had been paid on the note than the sum of $993.21, which the complaint alleges, such allegation not being denied by the answer, was paid on May 15th, 1918, such date being long prior to defendant's said letter of December 11th, 1918. Therefore, even if the application of the amount received from the maker were a condition, the condition was fulfilled, because nothing was received.

Nor can it be said that defendant in his said letter is merely acknowledging the note to the extent of the amount the letter of the plaintiff of November

19th, 1918, offered to take. The defendant's letter does not even intimate such a thing. Even if it did, however, it would cut no figure for a debtor can acknowledge part of a debt and the acknowledgment will be good as to the part. See

Oliver v. Gray, 1 Harr. & G. (Md.) 204.

But, to repeat, there is nothing in the defendant's letter to indicate that he intended to acknowledge his liability for only part of the note. The letter refers to the note generally and not to any partial liability upon it and when the defendant speaks about paying he does not say a word about paying only a portion. It is clear that when the defendant acknowledges the note he acknowledges his liability for the whole of it and not merely for a part. But if this court should think that the phraseology of the letter is at all doubtful upon this point it must resolve such doubt in favor of plaintiff and hold that the letter intends to acknowledge the note as a whole, because, as we have said before, this is an appeal from a judgment of non-suit and every doubt upon the evidence must be resolved in favor of the plaintiff. From this letter of defendant it is, at most, slightly doubtful whether defendant was referring to his willingness to pay the whole of the note or the portion thereof that the plaintiff had offered to take.

It is evident that this letter is alone ample to constitute an acknowledgment sufficient to toll the statute of limitations. And so, the subsequent letters may be eliminated from consideration. Defendant contends that in these subsequent letters, the first of

which was written eight months after defendant's said letter of December 11th, 1918, defendant merely offered to pay a part of the note. But even if he did, what difference would it make? He could not in this manner nullify or affect in any way the previous unqualified acknowledgment of the note made in his said letter of December 11th, 1918.

THE CASES CITED BY DEFENDANT.

All of the cases cited by the defendant on this question as to the requirements of an acknowledgment sufficient to toll the statute of limitations are, with the exception of the cases discussed below, cases where the alleged acknowledgment took place after the statute had run and have, of course, as this court is well aware, no application whatever to our case. They must for that reason, be disregarded. Therefore, only the other cases cited by the defendant will be discussed. They are the following:

In Rodgers v. Byers, 127 Cal. 528, as appears from page 19 of defendant's own brief, the promise was to pay when able. This is also true of Van Buskirk v. Kuhns, 164 Cal. 472. And whatever is said in these cases to the effect that the plaintiff must sue, not on the note, but on the new promise and that he must also allege that the defendant is able to pay, can have no application to our case since, as pointed out above, the defendant's letter of December 11th, 1918, does not make the crediting of the amount received from the trustee for the maker a condition of

his paying the note, and since, even if it did, such promise is sufficiently alleged by the allegations of our complaint to the effect that the defendant acknowledged the note and promised to pay the same and by the further allegation that nothing had been paid on the note except the payment mentioned in the complaint. Such a condition, that is, that all amounts received from the maker shall be credited before the guarantor pays the note, is really not a condition at all or such a condition as makes the promise to pay a new promise separate and distinct from the note, for such a condition is a condition exisiting in connection with every obligation, namely, that all payments must be credited thereon before any person liable therefor can be required to pay it. At all events it is not such a new promise as is the promise set forth in these two cases, that is, a promise to pay the obligation when able.

In Sherwood v. Lowell, 34 Cal. App. 365, it was held that the acknowledgment was not sufficient as it was not signed by the defendant.

In Outwaters v. Brownlee, 22 Cal. App. 535, the writing signed by the party sought to be charged recited that he had a certain sum of money on deposit in bank which he wished on his death paid to plaintiff for kindness shown him by her. The court very properly held that this was not an acknowledgment of an indebtedness.

Nixon v. Ramsey, 40 Cal. App. 240, was a case where, as appears from page 17 of defendant's

brief, the defendant wrote that it was impossible for him to pay at the time but that he hoped to pay up some day but was making no promises. Defendant's own statement is sufficient to show the absolute inapplicability of this case.

Morehouse v. Morehouse, 6 Cal. Unrep. 966, is not in point since, as also appears from page 17 of defendant's brief, the defendant promised to pay as soon as convenient or as soon as he could get it out of the ranch or from Mr. Barron. This was, of course, held to be insufficient.

A similar case is Visher v. Wilbur, 5 Cal. App. 562, where, as appears from page 18 of defendant's brief, the defendant merely promised to pay "if he ever got money enough to do so".

We now come to a discussion of defendant's last authority and the one on which he pins the most faith, namely, the case of Bullion and Exchange Bank v. Hegler, 93 Fed. 890, which was decided by Judge Morrow of this court. But that case is not in point either.

In that case the defendant's letter, which was sought to be deemed an acknowledgment sufficient to toll the statute of limitations, stated that defendant could not pay the note until he could turn some realty or other property into cash. Judge Morrow held that this was an acknowledgment of the note and indebtedness but that it was not an acknowledgment from which a promise to pay the debt could be inferred. Of course, it was not and simply be-

cause the defendant said he could not pay the note. But this has no application to our case. In our case the above mentioned letter of defendant of December 11th, 1918, instead of saying that defendant cannot or will not pay says in effect just the contrary; that is, that the defendant is perfectly willing to pay but that he feels that before he pays the note the amount received from the trustee for the maker should be applied on the note. So, it is apparent that this decision by Judge Morrow as applied to the facts of that case has no application whatsoever to our case. But the rules of law laid down in Judge Morrow's opinion have application to our case and really make his decision one in our favor instead of being in favor of the defendant. For, he there holds that where the acknowledgment is sufficient to infer a promise to pay the debt it is sufficient to toll the statute of limitations. And that is exactly as above pointed out, what the defendant's said letter of December 11th, 1918, does.

Judge Morrow also correctly points out in his decision that the law of California as interpreted by the courts thereof is to govern this case of ours now before this court. This being so, there is no question but what we are entitled to a reversal of this case, since all the California cases as well as the other cases cited by us hold that acknowledgments, many of them much weaker than the acknowledgment contained in defendant's said letter of December 11th, 1918, are sufficient to toll the statute of limitations. Not one of the cases cited by defendant

is opposed to our case and we believe that there are none.

We cited in our opening brief in support of our contention now under discussion numerous California and other cases but would like, just for a moment, to call the court's attention again to one of them, namely, Southern Pacific Co. v. Prosser, 122 Cal. 413, as it is such a strong case and is also cited by Judge Morrow in his opinion, referred to above, as correctly stating the law.

In this Southern Pacific Co. v. Prosser case the acknowledgment read as follows:

> "Dear Sir: Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can't you give me a chance to pay you in work? The company employs many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides. W. S. Prosser."

It is apparent that this acknowledgment is much weaker than that contained in defendant's said letter of December 11th, 1918, for in the Prosser case he did not say that he would pay or could pay, but merely that he wanted to pay. In fact, his letter intimates that he cannot pay as he asks the treasurer of the railroad company, to whom the letter was addressed, to let him pay his indebtedness by working for the company. Yet, the Supreme Court of California, whose decision must be held to be determinative of the question, held that Prosser's letter

was sufficient to toll the statute of limitations. The principle on which that case is based is, that a writing acknowledging the existence of the debt, which does not show an unwillingness to pay, is sufficient to overcome the statute of limitations. That is exactly the status of the above mentioned letter of defendant of December 11th, 1918. Therefore, that letter is sufficient to toll the statute of limitations. This Prosser case is alone, without the other cases cited by us, sufficient authority to require this court to reverse the judgment of the trial court.

Consequently, it is respectfully asked that the judgment be reversed.

Dated, San Francisco,
May 31, 1922.

Respectfully submitted,

WILLARD P. SMITH,
MARK J. WOOLEY,
Attorneys for Plaintiff in Error.